Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors

COURT OF APPEAL (PUTRAJAYA)
LOW HOP BING, ABDUL HAMID EMBONG AND SULAIMAN DAUD JJCA
10 JULY 2009

Contract — Sale and purchase of property — Breach — Failure to deliver vacant possession within time given — Appellant/vendor ordered to pay liquidated damages to purchasers — Appeal against order — Whether trial judge erred in computation of liquidated damages — Whether liquidated damages should be calculated from date next following completion date to date of issuance of COF — Whether delivery of vacant possession on date when appellant's architect certified that construction of property duly completed

The respondents had entered into a sale and purchase agreement ('SPA') to purchase from the appellant certain condominium units ('the property') at the prices as agreed upon in the SPA. It was a term of the SPA that the appellant would hand over vacant possession of the property to the respondents within 36 months from the date of the SPA (the completion date). In the event the appellant was unable to comply with this term, it would have pay to the respondents liquidated damages. When the appellant failed to hand over vacant possession of the property within the stipulated period, the respondents filed an action against it claiming, inter alia, liquidated damages in the sum of RM400,123.12, computed from the completion date to the date of issuance of the certificate of fitness for occupation ('the COF'). The trial judge allowed the respondents claim and hence the present appeal. It was the appellant's contention that the trial judge had erred in the computation of the liquidated damages from the date following the completion date to the date of issuance of the COF. The appellant submitted that the delivery of vacant possession of the property as stipulated under the SPA was on the date when the appellant's architect certified that the construction of the property had been duly completed and that the computation of liquidated damages should be from the date following the completion date to the date of submission of the architect's certificate. The respondents submitted that for the delivery of vacant possession to be effective the property conveyed must be capable of occupation and that occupation of the property was only possible with the issuance of the COF.

Held, allowing the appeal in part with each party to bear its own costs:

(1) The issuance of the COF was not one of the requirements to be fulfilled for the delivery of vacant possession within the meaning of cll 22 and 23

of the SPA. Clause 23(1) of the SPA provided that to constitute an effective delivery of vacant possession it should be sufficient for the appellant vendor to show that it had fulfilled three requirements, namely, that its architect had certified in Form E that the construction of the property had been duly completed; that the water and electricity supply were ready for connection to the property; and that the vendor had applied for the issuance of the COF from the appropriate authority. In the present case, although the architect had submitted the certificate in Form E to the relevant local authority for the issuance of the COF, that in itself did not constitute sufficient proof of the fact that the other two requirements had been fulfilled. As such, the date of issuance of the Form E was not the relevant date of delivery of vacant possession (see paras 10–13).

(2) In the light of the proviso to cl 23(1) of the SPA, the right of occupation was also not one of the factors to be considered in determining the time of delivery of vacant possession. As such the date of issuance of the COF was also not the relevant date of delivery of vacant possession (see paras 14, 15).

(3) After having regard to all the circumstances of the present case it was found that the date of issuance of the first temporary certificate of fitness was the date fit to be regarded as the date of delivery of vacant possession. Thus, the trial judge had erred in the computation of the liquidated damages and it should be calculated from the date next following the completion date to the date of the issuance of the first temporary certificate of fitness of the property ie, on 25 June 1999. Hence the order of the High Court in so far as it related to the computation of the liquidated damages was set aside and substituted with the new computation (see paras 16–19).

[Bahasa Malaysia summary

Responden-responden telah memeterai perjanjian jual beli ('PJB') untuk membeli beberapa unit kondominium ('hartanah tersebut') daripada perayu pada harga yang ditetapkan di dalam PJB. Adalah menjadi terma PJB bahawa perayu akan menyerahkan milikan kosong hartanah tersebut kepada responden-responden dalam masa 36 bulan dari tarikh PJB ('tarikh penyempurnaan'). Sekiranya perayu gagal untuk mematuhi terma ini, ia hendaklah membayar gantirugi yang ditetapkan kepada responden-responden. Apabila perayu gagal untuk menyerahkan milikan kosong hartanah tersebut dalam lingkungan masa yang ditetapkan, responden-responden telah memfailkan tindakan terhadap mereka menuntut, antara lain, ganti rugi yang ditetapkan dalam jumlah RM400,123.12, yang dikira dari tarikh penyempurnaan sehingga tarikh sijil penghunian ('SP') dikeluarkan. Hakim bicara membenarkan tuntutan responden-responden dan justeru rayuan ini. Adalah menjadi hujahan perayu bahawa hakim bicara telah khilaf dalam

pengiraan gantirugi yang ditetapkan dari tarikh berikutan tarikh penyempurnaan sehingga tarikh SP dikeluarkan. Perayu berhujah bahawa penyerahan milikan kosong hartanah seperti yang dinyatakan di bawah PJB adalah pada tarikh apabila arkitek perayu mengakui sah bahawa pembinaan hartanah telah disempurnakan dan bahawa pengiraan ganti rugi yang ditetapkan seharusnya bermula dari berikutan tarikh penyempurnaan sehingga tarikh penyerahan sijil arkitek. Responden-responden berhujah bahawa untuk penyerahan milikan kosong menjadi efektif hartanah yang diserahkan mestilah dapat dihuni dan bahawa penghunian hartanah tersebut hanya mungkin dengan pengeluaran SP.

Diputuskan, membenarkan sebahagian rayuan dengan pihak-pihak menanggung kos masing-masing:

(1) Pengeluaran SP bukanlah salah satu keperluan yang perlu dipenuhi bagi penyerahan milikan kosong di dalam maksud klausa 22 dan 23 PJB tersebut. Klausa 23(1) PJB memperuntukkan bahawa untuk membentuk penyerahan milikan kosong yang efektif adalah mencukupi bagi perayu penjual untuk menunjukkan bahawa ia telah memenuhi ketiga-tiga keperluan, iaitu, bahawa arkiteknya telah mengakui sah di dalam Borang E bahawa pembinaan hartanah telah disempurnakan; bahawa bekalan air dan elektrik tersedia untuk disambungkan kepada hartanah tersebut; dan bahawa penjual telah memohon untuk pengeluaran SP daripada pihak berkuasa yang berkenaan. Dalam kes ini, meskipun arkitek tersebut telah menyerahkan sijil dalam Borang E kepada pihak berkuasa tempatan yang relevan untuk pengeluaran SP, ia secara tersendirinya tidak membentuk bukti-bukti yang mencukupi tentang fakta bahawa dua keperluan yang lain telah dipenuhi. Oleh itu, tarikh pengeluaran Borang E bukanlah tarikh yang relevan bagi penyerahan milikan kosong (lihat perenggan).

(2) Melihat kepada proviso klausa 23(1) PJB, hak penghunian juga bukan salah satu faktor-faktor yang diambilkira dalam menentukan tempoh penyerahan milikan kosong. Oleh demikian, tarikh pengeluaran SP juga bukan tarikh yang relevan bagi penyerahan milikan kosong (lihat perenggan).

(3) Setelah melihat keseluruhan keadaan kes ini adalah didapati bahawa tarikh pengeluaran sijil penghunian sementara yang pertama adalah pada tarikh di mana dianggap bersesuaian sebagai tarikh penyerahan milikan kosong. Justeru, hakim bicara telah khilaf dalam pengiraan gantirugi yang ditetapkan dan ia hendaklah dikira dari tarikh seterusnya berikutan tarikh penyempurnaan sehingga tarikh pengeluaran sijil penghunian sementara yabg pertama bagi hartanah tersebut, iaitu, pada 25 Jun 1999. Oleh itu, perintah Mahkamah Tinggi setakat berkenaan dengan

pengiraan ganti rugi yang ditetapkan ditolak dan digantikan dengan pengiraan yang baru (lihat perenggan).] A

Notes

For cases on breach of sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5060–5066. B

Legislation referred to

Housing Developers (Control and Licensing) Regulations 1989 Form E

Appeal from: Suit No S4–24–1673 of 2003 (High Court, Kuala Lumpur) C

Tan Seng Cheong (Ricky Tan & Co) for the appellant.
Harpal Singh (K Kirubakaran and Harwinder Kaur with him) (AJ Ariffin, Yeo & Harpal) for the respondent.

Sulaiman Daud JCA: D

[1] This is an appeal by the appellant against the decision of the learned judge of the High Court in allowing the respondents' claim for liquidated damages pursuant to a sale and purchase agreement of property. After hearing submissions of counsel, we allowed the appeal in part. We now give our reasons for the decision. E

[2] Briefly, the facts relevant to this appeal are as follows. By a sale and purchase agreement executed between the parties ('the agreement'), the respondents (plaintiffs in the court below) agreed to purchase from the appellant (defendant in the court below) certain condominium units ('the property') at the prices stipulated therein. The agreement was based on the standard form contract as set out in the Housing Developers (Control and Licensing) Regulations 1989. F G

[3] By cl 22(1) of the agreement, the appellant agreed to hand over to the respondents 'vacant possession of the property to which water and electricity supply are ready for connection' within thirty-six months from the date of the agreement ('completion date'). Clause 7 stipulates that time shall be the essence of the contract. Clause 22(2) stipulates, as an express term, that if the appellant failed to hand over vacant possession of the property 'to which water and electricity are ready for connection' before the completion date, the appellant shall pay immediately to the respondents liquidated damages to be calculated from day to day at the rate of ten per centum pa of the purchase price. H I

[4] When the appellant failed to hand over vacant possession of the property within the stipulated period, the respondents filed the present originating summons claiming, among others, liquidated damages in the total sums of

RM400,123.12 computed from the day next following the completion date to the date of issuance of certificate of fitness for occupation ('the certificate of fitness'). The learned trial judge made orders in terms of the respondents' claim, and hence the present appeal.

[5] From the submission of learned counsel for both parties, it is apparent to us that the only issue that arose for determination in this appeal is the date of delivery of vacant possession of the property. The learned trial judge in allowing the respondents' claim ordered damages to be computed till the date of issuance of certificate of fitness of the property on 19 September 2001.

[6] It is not disputed that the appellant has failed to deliver vacant possession of the property to the respondents before the completion date. However learned counsel for the appellant contended that the learned trial judge had erred in the computation of the liquidated damages from the completion date to the date of issuance of certificate of fitness. It is his contention that by virtue of cl 22(1) of the agreement, delivery of vacant possession of the property was effective on the date of issuance of Form E by the appellant's architect certifying that the construction of the property has been duly completed.

[7] Learned counsel for the respondents, on the other hand, maintained that the issuance of Form E alone was not sufficient to prove that all the requirements for the delivery of vacant possession as stipulated under the agreement have been fulfilled. It was further submitted that for the delivery of vacant possession to be effective the property conveyed must be capable of occupation. According to learned counsel the only evidence available to support the delivery of vacant possession of the property was the issuance of the certificate of fitness, and by reason thereof it was contended that the learned trial judge had not erred in his finding.

[8] In determining the time of delivery of vacant possession of the property, we are of the view that cll 20(1) and 20(2) of the agreement have to be read together with cl 23 thereof. Clause 23 provides as s follows:

> 23 Manner of Delivery of Vacant Possession
>
> (1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel:

Provided that such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for occupation for the said building is issued.

(2) Upon the expiry of fourteen (14) days from the date of the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

[9] The procedure of obtaining certificate of fitness is provided in cl 25 of the agreement which reads as follows:

25 Vendor To Obtain Certificate of Fitness For Occupation

The Vendor shall, pursuant to the application for the Certificate of Fitness for Occupation under Clause 23(1), at its own cost and expense, duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the Certificate of Fitness in respect of the said Building.

[10] From the aforesaid provisions, we are unable to agree with learned counsel for the respondents that the issuance of certificate of fitness is one of the requirements to be fulfilled for the delivery of vacant possession within the meaning of cll 22 and 23 of the agreement. The intention of the parties not to relate the delivery of vacant possession to the issuance of certificate fitness can be inferred from the proviso to cl 23(1) which expressly provides that the delivery of vacant possession shall not give the purchaser the right of occupation.

[11] In our view, to constitute an effective delivery of vacant possession, it shall be sufficient for the appellant, as the vendor, to show that it has fulfilled the three requirements set out in cl 23(1), that is to say, firstly, its architect had certified in Form E that the construction of the property has been duly completed; secondly, water and electricity supply are ready for connection to the property; and thirdly, the vendor has applied for the issuance of the certificate of fitness from the appropriate authority in accordance with by-law 25(1) of the Selangor Uniform Building By-laws 1986 ('the By-laws'), being the By-laws applicable thereto.

[12] With regard to the first requirement, the appellant relied on the affidavit sworn by the architect in charge of the project to the effect that the certificate in Form E has been forwarded to the relevant local authority for the issuance of the certificate of fitness. The said Form E which was dated 2 February 1999 was also exhibited by the appellant as exh 'YYF1'. Learned counsel for the respondents however argued that the said Form E was not relevant as it was not made in the prescribed form, and that there was no endorsement of its receipt by the relevant local authority. With respect, we disagree. The positive assertion

made by the architect on the submission of Form E to the relevant local authority was not contradicted. Further, we are satisfied that it was made in the prescribed form and was issued in compliance with by-law 25(1) of the by-laws. In addition, no challenge was made on its authenticity.

[13] With regard to the second and third requirements, we agree with learned counsel for the respondents that the issuance of Form E by the architect did not constitute sufficient proof that these requirements have been fulfilled. The procedure of the issuance of Form E is regulated by the by-laws, and there is no requirement therein to have the water and electricity supply ready for connection at the time of issuance of the said certificate. Similarly by-law 25, which regulates the procedure of application of certificate of fitness, requires the application to be supported by the necessary documents to show that all the essential services, including access roads, landscape, car parks, drains, water and electricity installation, as the case may be, have been installed. In the present case, apart from the said Form E, no other documents were exhibited to support the making of such an application.

[14] What is then the effective date of the delivery of vacant possession herein? Learned counsel for the respondents submitted that in the absence of any evidence to show that all the three requirements aforesaid have been satisfied at the time of issuance of Form E, then the date of issuance of certificate of fitness should be taken as the delivery date. It is contended that until such time, the respondents have no right to occupy or enjoy the said property.

[15] With respect, we are unable to agree with him. To recapitulate, it is expressly provided in the proviso to cl 23(1) of the agreement that that delivery of vacant possession shall not give the purchaser the right to occupy the property in question. As such, the right of occupation is not one of the factors to be considered in determining the time of delivery of vacant possession under the agreement.

[16] None the less, we agree that for the delivery of vacant possession to be effective the property must be in a state in which it could be occupied upon the issuance of the appropriate certificate of fitness by the relevant local authority. In this respect, it is to be recalled that in the course of submission before us, we were referred by learned counsel for the appellant to two temporary certificates of fitness for occupation ('temporary certificate of fitness') of the property which were exhibited in the respondents' supporting affidavit. The first certificate was dated 25 June 1999 and valid for a period of six months from 19 February 1999 to 18 August 1999. The second certificate which was dated 25 June 1999 was also for a period of six months from 20 December 1999 to 19 June 2000. In addition, there was the evidence led by the appellant to the effect

that the first temporary certificate of fitness was granted one month after the issuance of the letter of delivery of vacant possession to the respondents, and that the same had been renewed from time to time until the grant of the permanent certificate of fitness.

[17] The temporary certificate of fitness was issued pursuant to by-law 26(1) of the by-laws which empowers the relevant local authority in its discretion to grant such certificate for a period not exceeding six months in cases where only minor deviation from the approved building plan had been made and pending full compliance with the requirements of the local authority before the issuance of certificate of fitness for occupation.

[18] Having ruled out the date of issuance of Form E, or the date of issuance of certificate of fitness, as the relevant date of delivery of vacant possession, and having regard to all the circumstances of the present case, we deem it fit for the justice of the case to take the date of issuance of the first temporary certificate of fitness, as the date of delivery of vacant possession herein. In our view to go beyond that date to the date of the issuance of certificate of fitness would defeat the expressed intention of both parties as stipulated in cll 22 and 23 of the agreement. We observed that both the temporary certificate and the certificate of fitness gave the respondents the right to occupy and enjoy the property in question. Even though the right given under the temporary certificate of fitness is not permanent but in the present case it has been renewed from time to time till the issuance of the certificate of fitness.

[19] For the reasons afore said, we are of the view that the learned trial judge had erred in the computation of the liquidated damages to the date of the issuance of the certificate of fitness. In our view, it should be calculated from the date next following the completion date to the date of the issuance of the first temporary certificate of fitness of the property, ie on 25 June 1999.

[20] In conclusion, we unanimously allowed the appeal in part. The order of the High Court in so far as it relates to the computation of the liquidated damages were set aside and substituted with the computation as alluded above. Each party shall bear its own costs.

Appeal allowed in part with each party to bear its own costs.

Reported by Kohila Nesan